

592  
No. 1801

---

---

# UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

---

F. E. EARNHART,

Appellant,

vs.

JOHN B. SWITZLER,

Appellee.

---

## TRANSCRIPT OF RECORD.

---

Upon Appeal from the United States Circuit Court  
for the District of Oregon.

---

**FILED**  
JAN 14 1910



Accounts of U.S. Congress

Committee of Appointments

572



No. 1801

---

---

**UNITED STATES CIRCUIT COURT OF APPEALS**

FOR THE NINTH CIRCUIT.

---

F. E. EARNHART,

Appellant,

vs.

JOHN B. SWITZLER,

Appellee.

---

**TRANSCRIPT OF RECORD.**

---

Upon Appeal from the United States Circuit Court  
for the District of Oregon.

---



## INDEX.

---

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

	Page
Addresses and Names of Attorneys of Record..	1
Affidavit of J. B. Perry Relative to the Answer.	24
Affidavit of R. J. Slater, Relative to the Answer.....	23
Answer .....	15
Answer, Affidavit of J. B. Perry Relative to the .....	24
Answer, Affidavit of R. J. Slater, Relative to the .....	23
Answer, Motion to Strike the.....	22
Answer, etc., Notice of Motion to Vacate Order Striking .....	27
Answer, Order Striking, and Taking Bill of Complaint as Confessed .....	26
Appeal, Bond on .....	43
Appeal, Order Allowing .....	42
Appeal, Petition for .....	37
Assignment of Errors.....	39
Bill of Complaint.....	3
Bill of Complaint, Demurrer to the.....	12
Bill of Complaint, Order Overruling the Demurrer to the.....	14

Index.	Page
Bill of Complaint, Order Striking Answer and Taking as Confessed .....	26
Bond on Appeal. ....	43
Certificate of Clerk U. S. Circuit Court to Tran- script of Record.....	45
Citation, Original.....	1
Complaint, Bill of .....	3
Complaint, Bill of, Answer and Taking, as Con- fessed, Order Striking .....	26
Complaint, Bill of, Order Overruling the De- murrer to the.....	14
Complaint, Demurrer to the Bill of.....	12
Decree .....	31
Decree Pro Confesso, Motion for an Order Va- cating Order for a.....	28
Decree, Pro Confesso, Order Denying Motion to Vacate the .....	30
Demurrer to the Bill of Complaint.....	12
Demurrer to the Bill of Complaint, Order Over- ruling the .....	14
Motion for an Order Vacating Order for a De- cree Pro Confesso.....	28
Motion to Strike the Answer.....	22
Motion to Vacate Order Striking Answer, etc., Notice of .....	27
Motion to Vacate the Decree Pro Confesso, Order Denying .....	30
Names and Addresses of Attorneys of Record..	1
Notice of Motion to Vacate Order Striking An- swer, etc.....	27
Order Allowing Appeal.....	42



Index.

Page

Order Denying Motion to Vacate the Decree Pro Confesso .....	30
Order for a Decree Pro Confesso, Motion for an Order Vacating .....	28
Order Overruling the Demurrer to the Bill of Complaint .....	14
Order Striking Answer and Taking Bill of Complaint as Confessed .....	26
Order Vacating Order for a Decree Pro Confesso, Motion for an.....	28
Petition for Appeal.....	37
Transcript of Record, Certificate of Clerk U. S. Circuit Court to.....	45



*In the United States Circuit Court of Appeals, for  
the Ninth Circuit.*

F. E. EARNHART,

Appellant,

vs.

JOHN B. SWITZLER,

Appellee.

**Names and Addresses of Attorneys of Record.**

DOUGLAS W. BAILEY, Pendleton, Oregon,  
for Appellant.

R. J. SLATER, Pendleton, Oregon, and JAMES  
A. FEE, Pendleton, Oregon, for Appellee.

---

*In the Circuit Court of the United States for the  
District of Oregon.*

JOHN B. SWITZLER,

Complainant,

vs.

F. E. EARNHART,

Defendant.

**Citation [Original].**

The President of the United States, to John B.  
Switzler, the Above-named Complainant,  
Greeting:

You are hereby cited and admonished to be and  
appear at the United States Circuit Court of Ap-  
peals for the Ninth Circuit at the City of San Fran-  
cisco, State of California, within thirty days from  
the date of this writ, pursuant to order allowing an

appeal, filed in the Clerk's office in the above-entitled court, wherein F. E. Earnhart is appellant and you are appellee, and show cause if any there be why the decree rendered against the said appellant should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable CHARLES E. WOLVERTON this 17th day of November, 1909.

CHAS. E. WOLVERTON,  
District Judge.

Attest:

G. H. MARSH,  
Clerk.

State of Oregon,  
County of Umatilla,—ss.

I hereby admit service of the foregoing Citation upon me as solicitor for appellee, at Pendleton, Umatilla County, Oregon, this 20 day of November, 1909, and waive further notice or service of the notice of said appeal.

FEE & SLATER,  
Solicitors for Complainant.

[Endorsed]: In the Circuit Court of the United States for Dist. of Oregon. John B. Switzler, vs. F. E. Earnhart. Citation on Appeal. U. S. Circuit Court. Filed Nov. 26, 1909. G. H. Marsh, Clerk. District of Oregon. Douglas W. Bailey, Solicitor for Appellant.

*In the Circuit Court of the United States for the  
District of Oregon.*

October Term, 1908.

Be it remembered, that on the 8th day of April, 1909, there was duly filed in the Circuit Court of the United States for the District of Oregon, a Bill of Complaint, in words and figures as follows, to wit:

*In the Circuit Court of the United States for the  
District of Oregon.*

JOHN B. SWITZLER,

Complainant,

vs.

F. E. EARNHART,

Defendant,

**Bill of Complaint.**

To the Honorable, the Judges of the Circuit Court  
of the United States for the District of Oregon:

Humbly complaining your orator, John B. Switzler, a citizen of the United States and a resident and inhabitant of Umatilla County, State of Oregon, and 68 years of age, brings this his Bill of Complaint against F. E. Earnhart, a citizen and inhabitant of said county and State, and, therefore, your orator complains and says:

1.

That your orator is a citizen of the United States, over twenty-one years of age, and is a resident and inhabitant of Umatilla County and State of Oregon, and is not the owner of sufficient land, which to-

gether with the land hereinafter described would amount to more than three hundred and twenty acres, and your orator was at all times hereinafter mentioned and now is, in all respects, qualified to enter and purchase from the United States public lands thereof under the public land laws of the said United States.

## 2.

That on or about the — day of —, 1893, your orator for the purpose and with the intention of entering, purchasing and obtaining the title thereto from the United States, settled upon, took possession of and placed permanent and valuable improvements upon that certain tract of public land of the United States situated in Umatilla County, State of Oregon, generally known and described as the Dave Beavert Island, the same being unsurveyed and an island in the Columbia River in what will be, when the lines of the public survey are extended thereto, in Section Four, Township Five and Section Thirty-three, Township Six North, Range Thirty and contains about 80 acres. Said island being surrounded by waters of the Columbia River continuously, excepting occasionally at extremely low water, where at one point the channel between said island and the main land on the Oregon side may at such times of extreme low water in the Columbia River become dry for a short distance, but otherwise and usually the water surrounding said island forms a natural inclosure thereof.

## 3.

That your orator, at the time he settled upon and

took possession of said island in the manner and for the purpose aforesaid, for the purpose of protecting the shores of said island from washing away and for the purpose of holding said island in his actual possession against all other persons planted trees around the shore line thereof, which trees have grown to be large and form a protection to the shores of said island and an inclosure thereof.

## 4.

That at the time your orator settled upon said island, there was a dwelling-house and other improvements thereon, which together with the right of possession thereof your orator purchased from one Dave Beavert, who prior to said time had possession of and had settled upon said island, for which your orator paid the said Dave Beavert the sum of about \$700.00.

## 5.

That since your orator has had possession of said island your orator has greatly improved the same by clearing, plowing, leveling, cultivating and seeding to alfalfa about 80 acres thereof, upon which annually, there is raised a large amount of alfalfa hay, to wit, about 100 tons of the value each year of about \$800.

## 6.

That in addition to the said dwelling-house and 80 acres of alfalfa meadow and the trees planted around the shores of said island your orator has other improvements thereon consisting of a chicken-house, outbuildings and fencing, the value of said improvements being not less than \$2,000.



## 7.

That, on or about the — day of ———, 1903, your orator desiring to be temporarily absent from said land leased the same to John E. Hatter for the term of five years, the said Hatter contracting and agreeing for a certain and valuable consideration to enter upon and take and hold the possession of said island as the tenant and lessee of said island and at the expiration of said time to return the possession of the said island back to the possession of your orator.

## 8.

That on the 1st day of Jan., A. D. 1909, a further contract of lease was made and entered into by and between your orator and John D. Hatter by the terms of which the said John D. Hatter was to retain the possession of said island as the lessee for the term of three months to and including the 1st day of March, 1909, for which further use and occupation of said island the said John D. Hatter promised and agreed to pay your orator the sum of One Dollar in advance, and at the end of the said term the said John D. Hatter promised and agreed to quit and deliver up said possession to your orator, his agent or attorney, peaceably and quietly.

## 9.

That at some time prior to the 31st day of March, 1909, the exact date of which is unknown to your orator, the said John D. Hatter and the defendant, combining and conspiring together to and with diverse other persons as yet to your orator unknown, but whose names, when discovered, your



orator prays may be inserted herein as defendants and made parties hereto with proper and apt words to charge them as parties defendant hereto and contriving how to injure and oppress your orator in the premises, the said confederates, respectively do now absolutely refuse to surrender up to your orator the possession of the said premises, and the said John D. Hatter for the purpose of cheating and defrauding your orator out of said property, to wit, the possession and right of possession of, in and to the said island, and of all of the said improvements thereon, permitted the defendants to enter upon and take possession thereof to the absolute exclusion of your orator and for the purpose of defrauding your orator out of his said property, the defendants did on and prior to the 31st day of March, 1909, clandestinely, fraudulently and corruptly for the purpose of defrauding your orator of his said property and out of his possession and right of possession of said premises with the fraudulent, corrupt and clandestine aid, assistance and countenance of said John E. Hatter enter upon and take possession of said premises to the exclusion of your orator therefrom, and the said defendant ever since the 31st day of March, 1909, continuously remained and continued and now is in the possession thereof to the utter exclusion of your orator, and threatens and intends to so keep possession thereof and the said defendant and his said co-conspirators, for the purpose of intimidating your orator and preventing your orator from entering upon the said premises and regaining the possession thereof, have threatened to shoot and

kill your orator if your orator attempted to regain possession thereof, and your orator by reason of the said threats verily believes that if your orator should attempt to enter upon and regain possession of said premises without the aid and assistance of this Honorable Court that the defendant and his said co-conspirators would attempt to kill your orator or do him great bodily injury.

10.

That the defendant and his said co-conspirators by depriving your orator of the possession of said premises, as aforesaid, have greatly damaged your orator in the sum of \$1,000.

11.

That the defendant is impecunious and has no property, or means, out of which a judgment for damages might be recovered.

12.

That the value of said premises and improvements thereon, as hereinabove described, and the right of your orator therein and thereto is not less than \$4,000.

13.

That your orator ever since he first settled upon and improved said island has held and improved the same with the intention and purpose of requiring title there under the homestead laws of the United States, and it is now the purpose and the intention of your orator to so acquire the title thereto as soon as the same is surveyed by the United States.

14.

And your orator further shows that he has a large

amount of personal property, consisting of plows, harrows, hay-rakes, mowing machines, wagons, harness, one horse, household furniture, including two sets of bedroom furniture, with marble tops, bedding and spring mattresses, chairs and tables and cooking stove and furniture, heating stove and many other articles necessary for farming and housekeeping, the use and possession of which has been taken from your orator and the value of which is not less than \$500, all of which is in great danger of being injured and destroyed without the care and attention of your orator.

## 15.

And your orator further shows that the defendant herein has no improvements of any kind whatever upon said land and has very little if any personal property thereon; that so far as your orator knows, or is informed, the only property belonging to the defendant upon said island consists of a tent and some bedding and some cooking utensils, of little value.

## 16.

And your orator further says that the said John E. Hatter, the co-conspirator with the defendant, pretends to have left and abandoned the said premises and to have been ousted therefrom by the defendant, but your orator is informed and alleges that the defendant has received and taken charge and possession of the personal property and effects of the said John E. Hatter upon said island and is holding the same thereon for the said Hatter, and the said John E. Hatter and the defendant have cor-

ruptly and fraudulently conspired and agreed with each other to prevent your orator from entering upon said land and taking possession of the same.

17.

And your orator further shows that the first crop of alfalfa upon said land is fast maturing and needs the immediate attention of your orator, and the said crop will be greatly damaged unless it is properly cared for and looked after.

18.

That your orator has no relief at law in the premises and are unable to obtain any relief against the said wrongful and fraudulent acts of the defendant except in equity, and in this Honorable Court.

To the end, therefore, that your orator may have that relief, which he can only obtain in a court of equity and that the said defendant may answer the premises, but not upon oath or affirmation, an answer being hereby expressly waived by your orator, he now prays the Court:

That your Honors grant unto your orator your writ of injunction pendente lite commanding said F. E. Earnhart, and all persons claiming to act under his authority, direction or control, absolutely to desist and refrain from in any manner interfering with your orator's possession of the premises described in your orator's Bill of Complaint, and commanding the defendant to immediately depart therefrom and not to return thereto or to any part thereof, and to refrain from in any manner interfering with said premises or with anything thereon; as, also, a restraining order to the same effect until an

application for such injunction can be heard and at the final hearing such injunction may be made perpetual.

And your orator further prays that your orator have judgment against the defendant herein for the damages sustained by your orator by reason of the acts of the defendant herein complained of in the amount of \$1,000, and, also, that your orator have judgment against the defendant for his costs and disbursements herein.

And your orator further prays that your Honor may grant unto your orator a writ of subpoena of the United States of America, issued out of and under the seal of this Honorable Court directed to the defendant therein, and thereby directing and commanding said defendant at a certain time and under a certain penalty therein named, personally to be and appear before this Honorable Court, then and there to answer all and singular (but not under oath, answer under oath being hereby expressly waived) the matters aforesaid, and to stand and abide by and sustain such direction and decree as shall be made herein as to your Honor shall seem equitable and just, and your orator prays for such further relief in the premises as the nature and circumstances of this case require as to this Honorable Court may seem meet and proper, and your orator as in duty bound will ever pray.

FEE & SLATER,

Solicitors for the Complainant.



State of Oregon,  
County of Umatilla,—ss.

I, John B. Switzler, being first duly sworn, depose and say that the said Bill of Complaint and all the facts therein stated are true as I verily believe.

JOHN B. SWITZLER.

Subscribed and sworn to before me this 7th day of April, 1909.

[Seal]

R. J. SLATER,  
Notary Public for Oregon.

Filed April 8, 1909. G. H. Marsh, Clerk of the U. S. Circuit Court.

---

And afterwards, to wit, on the 27th day of April, 1909, there was duly filed in said court, a demurrer to the Bill of Complaint, in words and figures as follows, to wit:

**[Demurrer to the Bill of Complaint.]**

*In the Circuit Court of the United States for the District of Oregon.*

IN EQUITY.

JOHN B. SWITZLER.

vs.

F. E. EARNHART.

The demurrer of the above-named defendant, F. E. Earnhart, to the bill of complaint of the above-named plaintiff.

This defendant by protestation, not confessing or acknowledging all or any of the matters or things in the said bill of complaint contained to be true in such manner and form as the same are therein set forth and alleged, doth demur to the said bill. And for cause of demurrer showeth:

I.

That it appears from said plaintiff's bill of complaint that no federal question is involved therein; and

II.

That there is no adverse citizenship shown by said bill of complaint.

III.

That it appears from said bill of complaint that this court has no jurisdiction of the subject matter of this suit or jurisdiction to try the same.

DOUGLAS W. BAILEY,

Solicitor for Deft.

State of Oregon,  
County of Umatilla,—ss.

I hereby certify that the foregoing demurrer is in my opinion well founded in point of law.

DOUGLAS W. BAILEY,

Solicitor for Defendant.

State of Oregon,  
County of Umatilla,—ss.

I, F. E. Earnhart, being first duly sworn, depose and say I am the defendant above named and that the foregoing demurrer is not interposed for delay.

F. E. EARNHART.

Subscribed and sworn to before me this 17th day of April, 1909.

W. L. GUERRANT,  
Justice of the Peace for Stoldman Dist., Umatilla  
County, Oregon.

Filed April 27, 1909. G. H. Marsh, Clerk of the  
U. S. Circuit Court, District of Oregon.

---

And afterwards, to wit, on Tuesday, the 27th day of April, 1909, the same being the 14th judicial day of the regular April, 1909, term of said Court—Present, the Honorable CHARLES E. WOLVERTON, United States District Judge, presiding—the following proceedings were had in said cause, to wit:

**[Order Overruling the Demurrer to the Bill of Complaint.]**

*In the Circuit Court of the United States for the  
District of Oregon.*

No. 3496.

April 27, 1909.

JOHN B. SWITZLER

vs.

F. E. EARNHART.

Now, at this day, this cause comes on to be heard upon the demurrer of the defendant to the Bill of Complaint herein and was argued by Mr. R. J. Slater, of counsel for the plaintiff, the defendant not appearing. On consideration whereof, it is ordered



that said demurrer be, and the same is hereby, over-ruled. And it is further ordered that said defendant be, and he is hereby, allowed until the June, 1909, Rule Day of the Court within which to file an answer herein.

---

And afterwards, to wit on the 1st day of June, 1909, there was duly filed in said court, an Answer, in words and figures as follows, to wit:

*In the Circuit Court of the United States for the District of Oregon.*

JOHN B. SWITZLER,

Plaintiff,

vs.

F. E. EARNHART,

Defendant.

**Answer.**

In answer to the bill of complaint of the above-named plaintiff the defendant, F. E. Earnhart, says as follows:

I.

That I do not know if the above-named John B. Switzler is now qualified to enter or purchase from the United States public lands under the public land laws of the United States, and I therefore deny the same.

II.

That the plaintiff did not on or about the — day of —, 1893, settle upon or take possession of or place valuable improvements upon that certain

tract of public land of the United States known and described as the Dave Beavert Island, with the intention of obtaining title thereto from the Government of the United States under any of the land laws thereof.

### III.

Defendant says that plaintiff at the time he settled upon and took possession of said land, or at any time, did not for the purpose of protecting the shores of said island, or for any purpose, plant trees around the shore line thereof, or that said trees so planted have grown and are now large trees and form a protection to the shores of said island, or in inclosure thereof, and defendant declares that said island has no enclosure.

### IV.

And the defendant says that there is a small dwelling-house upon said island which was placed there by some person a great many years ago, prior to the time the plaintiff ever entered into possession of said island, and that said house is now an old and dilapidated affair and is worth perhaps \$100.00, and no more; and the defendant says the plaintiff did not pay to the said Dave Beavert therefor the sum of \$700.00, or any other or greater sum than \$100.00.

### V.

And the defendant says that the plaintiff has not at any time greatly, or at all, improved the said island by clearing, plowing, levelling, cultivating or seeding to alfalfa eighty acres thereof, or any number of acres thereof, upon which annually there is

raised one hundred, or any number of, tons of alfalfa hay of the value of \$800.00, or any other sum. And the defendant says that said ground which is now cleared and in cultivation thereon was cleared and put into such cultivation by a man by the name of Hatter, and that there is now in cultivation on said island about thirty acres which has a very inferior growth of alfalfa thereon.

## VI.

And defendant says that the plaintiff has not at any time put or added other improvements thereon consisting of a chicken-house and outbuildings and fences of the value of \$2,000.00 or any other sum over about perhaps \$100.00. And defendant further says that such improvements were made thereon by a man by the name of J. E. Hatter.

## VII.

This defendant admits that said Switzler made a pretended lease to John E. Hatter to this land for the period of time alleged in his complaint.

## VIII.

And defendant says that he has no knowledge or information concerning the matter set forth in Paragraph VIII of plaintiff's bill of complaint, and therefore denies the same, and asks that plaintiff be put to proof in regard thereto.

## IX.

This defendant denies that at some time prior to the 31st day of March, 1909, or at any other time, John E. Hatter and this defendant combined or conspired together, or at all, with divers other persons,

or any other persons, known or unknown to the plaintiff, or that they, or either of them conspired to injure or oppress plaintiff, or that the said defendant or his confederator, absolutely or otherwise, refused to render up to the plaintiff possession of said premises, or that the said John E. Hatter for the purpose of cheating or defrauding plaintiff or otherwise out of the possession or right of possession of said island, or the improvements thereon, permitted this defendant to enter upon or take possession of said lands to the exclusion of plaintiff, or for the purpose of defrauding plaintiff out of his said property, or that the said defendant did on or prior to the 31st day of March, 1909, or at any other time, clandestinely, fraudulently or corruptly, or for the purpose of defrauding plaintiff of his said or any property, or out of his possession or right of possession of said premises, or in any way to fraudulently, corruptly and clandestinely, or otherwise, aid or assist or countenance or otherwise the said John E. Hatter, or anyone, entering upon or taking possession of said premises to the exclusion of the plaintiff therefrom; or that the defendant ever since the 31st day of March, 1909, continuously remained or continued or now is in the possession of said land to the utter exclusion of plaintiff, or threatens or intends to so keep possession thereof, except as hereinafter stated; or that the defendant for the purpose of intimidating plaintiff or preventing him from entering upon said premises or recovering possession thereof; nor has defendant threatened to

shoot or kill plaintiff if the plaintiff attempted to recover possession thereof, or at all; or that the plaintiff by reason of said or any other threats believed that should the plaintiff attempt to enter or recover possession of the said premises, with or without the aid or assistance of this Honorable Court, that the defendant, or his conspirators, or either of them, would attempt to kill the plaintiff, or to do him great or any bodily harm.

X.

And the defendant denies that this defendant, or his co-conspirators, or either of them, by depriving plaintiff of the possession of said premises, or otherwise, have greatly or otherwise damaged plaintiff in the sum of \$1000.00, or any other sum.

XI.

Defendant denies that he is impecunious or has no property or means out of which a judgment for damages might be recovered.

XII.

Defendant denies that the value of said premises and the improvements thereon or the right of the plaintiff therein or thereto is not less than \$4,000.00, or any other or greater sum than \$300.00.

XIII.

Defendant denies that the plaintiff ever since he first settled upon or improved said island, or at any time, has held or improved the same with the intention or purpose of acquiring title thereto under the homestead laws of the United States, or that it is now the purpose, or ever was, or the intention of the



plaintiff to so acquire title thereto as soon as the same is surveyed by the United States, or at any time.

#### XIV.

This defendant denies that the plaintiff has a large amount of personal property, or any amount of personal property, consisting of plows, harrows, hay-rakes or other implements described in the complaint, the use or possession of which has been taken away from plaintiff, or the value of which is not less than \$500.00, or any other sum, or all of which, or any of which, is great or any danger of being injured or destroyed without the care or attention of plaintiff.

#### XV.

Defendant denies that this defendant has no improvements upon said land, or has very little if any personal property.

#### XVI.

Defendant denies that John E. Hatter pretended to have left and abandoned the said premises and to have been ousted therefrom by this defendant; and denies that this defendant has received or taken charge or possession of the personal property, or any personal property or effects of the said John E. Hatter upon said island, or is holding the same thereon for the said John E. Hatter; or that the said John E. Hatter and the defendant have corruptly and fraudulently conspired or agreed with each other, or otherwise, to prevent the plaintiff from entering upon said land, or taking possession of the same.

## XVII.

Defendant denies that the first crop of alfalfa upon said land is fast maturing, or needs immediate or any attention of the plaintiff.

## XVIII.

Defendant denies that the plaintiff has no remedy at law in the premises, or that he is unable to obtain relief, if he is entitled to any, except in a Court of Equity, or this Honorable Court.

And for further answer defendant says that the plaintiff's bill of complaint herein does not state a cause of suit cognizable in this Honorable Court, and that this Honorable Court has no jurisdiction of the subject matter or the parties to said suit, and that the plaintiff's said bill of complaint herein should be dismissed.

Wherefore, the said defendant having answered the plaintiff's bill of complaint herein prays the Honorable Court that said bill of complaint of plaintiff be dismissed, and that defendant go hence without day and have his judgment against plaintiff for costs and disbursements herein sustained, and for such other and further relief as in the premises he may be entitled to.

DOUGLAS W. BAILEY,

J. B. PERRY,

Solicitors for Defendant.

Filed June 1, 1909. G. H. Marsh, Clerk of the United States Circuit Court, District of Oregon.

And afterwards, to wit, on the 22d day of June, 1909, there was duly filed in said court, a motion to strike out answer, and for a decree pro confesso, in words and figures as follows, to wit:

*In the Circuit Court of the United States for the District of Oregon.*

JOHN SWITZLER,

Complainant,

vs.

F. E. EARNHART,

Defendant.

**Motion to Strike the Answer.**

Comes now the complainant above named, by Fee & Slater, his solicitors, and moves this Honorable Court for an order striking out the answer of the defendant heretofore filed herein, for the reason that no copy of said answer was ever served upon the complainant or his attorneys of record herein, and no copy thereof was deposited with the clerk of this court for the complainant, and for an order that the bill of complaint herein be taken pro confesso.

FEE & SLATER,

Solicitors for Complainant.

Copy of the within motion certified by R. J. Slater, atty. for plaintiff, deposited with me for defendant pursuant to Rule 9 of the Rules of this Court, this June 22, 1909.

G. H. MARSH,

Clerk.



Above copy mailed to D. W. Bailey, atty. for defendant, this June 22, 1909.

G. H. MARSH,  
Clerk.

Filed June 22, 1909. G. H. Marsh, Clerk of the United States Circuit Court, District of Oregon.

---

And afterwards, to wit, on the 22d day of June, 1909, there was duly filed in said court an affidavit of R. J. Slater, in words and figures as follows, to wit:

**[Affidavit of R. J. Slater, Relative to the Answer.]**

*In the Circuit Court of the United States for the District of Oregon.*

JOHN SWITZLER,

Complainant,

vs.

F. E. EARNHART,

Defendant.

State of Oregon,  
County of Umatilla,—ss.

I, R. J. Slater, being first duly sworn, say I am one of the attorneys for the complainant herein, and that no copy of the answer filed herein by the above-named defendant was ever served upon the complainant herein or myself or James A. Fee, the solicitors for the complainant.

R. J. SLATER.

Subscribed and sworn to before me this 21st day of June, 1909.

[Seal]

STEPH. A. LOWELL,  
Notary Public for Oregon.

Copy of the within affidavit certified to by R. J. Slater, attorney for plaintiff, deposited with me this 22d day of June, 1909, pursuant to Rule 9 of the Rules of this Court.

G. H. MARSH,  
Clerk.

Above copy mailed to D. W. Bailey, this June 22, 1909.

G. H. MARSH,  
Clerk.

Filed June 22, 1909. G. H. Marsh, Clerk, U. S. Circuit Court, District of Oregon.

---

And afterwards, to wit, on the 24th day of June, 1909, there was duly filed in said court an affidavit of J. B. Perry, in words and figures as follows, to wit:

*In the Circuit Court of the United States for the District of Oregon.*

J. B. SWITZLER,

Plaintiff,

vs.

F. E. EARNHART,

Defendant.

**Affidavit [of J. B. Perry Relative to the Answer].**

I, J. B. Perry, being first duly sworn, say that when the answer in the foregoing action was pre-

pared a copy was prepared to serve upon the attorneys for the plaintiff; that if the same has not been received by such attorneys it was through an oversight, and that it was the intention of the defendant to furnish the plaintiff with a copy of such answer, and that as soon as defendant was advised that the attorneys for the plaintiff had received no copy that a copy was furnished them, and that such copy was furnished Fee & Slater on June 23, 1909.

J. B. PERRY.

Subscribed and sworn to before me this 23d day of June, 1909.

[Seal]

C. W. BROWNFIELD,  
Notary Public for Oregon.

Filed June 24, 1909. G. H. Marsh, Clerk United States Circuit Court, District of Oregon.

And afterwards, to wit, on Tuesday, the 27th day of July, 1909, the same being the 92d Judicial day of the regular April, 1909, Term of said Court—Present, The Honorable CHARLES E. WOLVERTON, United States District Judge, presiding—the following proceedings were had in said cause, to wit:

**[Order Striking Answer and Taking Bill of Complaint as Confessed.]**

*In the Circuit Court of the United States for the District of Oregon.*

No. 3496.

July 27, 1909.

JOHN B. SWITZLER

vs.

F. E. EARNHART.

Now, at this day, comes the plaintiff by Mr. R. J. Slater, of counsel, and moves the Court for an order striking out the answer of the defendant heretofore filed herein, and for a decree pro confesso; and it appearing to the Court from the affidavit of R. J. Slater, filed herein, that said defendant has failed to serve said answer as required by Rule 7 of the Rules of this Court, It Is, Therefore, Ordered that said answer be, and the same is hereby, stricken out.

And it further appearing to the Court that the demurrer filed by said defendant to the Bill of Complaint herein was heretofore overruled, and that said defendant has failed to serve and file as required by

the rules of this Court his answer within the time heretofore allowed by the order of this Court; It Is, Therefore, Ordered, Adjudged and Decreed that the Bill of Complaint therein be, and the same is hereby, taken as confessed by said defendant.

---

And afterwards, to wit on the 23d day of August, 1909, there was duly filed in said court, a motion to vacate decree pro confesso, in words and figures as follows, to wit:

**[Notice of Motion to Vacate Order Striking Answer, etc.]**

*In the Circuit Court of the United States for the District of Oregon.*

No. —

JOHN B. SWITZLER,

Plaintiff,

vs.

F. E. EARNHART,

Defendants.

To John B. Switzler, the Above-named Plaintiff, and to Fee & Slater, His Solicitors:

You and each of you will please take notice that the above-named defendant has filed his motion in the above-entitled suit to vacate the order of the Court heretofore made directing the answer of the defendant be stricken and for a decree pro confesso, a copy of said motion is herewith served upon you, and you are further advised that the defendant will

ask the Court to consider said motion at the next rule day of said court, at ten o'clock A. M. of said day, or as soon thereafter as the same may be heard.

DOUGLAS W. BRADY,  
Solicitor for the Defendant.

*In the Circuit Court of the United States for the  
District of Oregon.*

No. —

JOHN B. SWITZLER,

Plaintiff,

vs.

F. E. EARNHART,

Defendant.

**Motion [for an Order Vacating Order for a Decree  
Pro Confesso].**

Comes now the defendant by his solicitor and moves the Court for an order vacating and setting aside an order heretofore made in this cause for decree pro confesso for want of an answer.

This motion is based upon the records herein, and will be submitted upon the records herein, which shows affirmatively that the defendant Earnhart filed his answer to the plaintiff's bill of complaint herein, within the time prescribed by law, and it further appears by the affidavit of J. B. Perry that it was the intention of the defendant and his solicitor to serve the plaintiff with a copy thereof, but that through oversight, or unintentional omission, such service was not had upon the plaintiff or his counsel, and that thereafter the plaintiff filed his

motion herein to strike said answer from the files for the reason that the same had not been served, and it further appears that immediately after the filing of said motion by plaintiff to strike said answer, the defendant prepared and caused to be served upon the plaintiff or his solicitor a copy of said answer so filed, and that thereafter, notwithstanding the service of said copy, the plaintiff pressed his motion for a decree pro confesso and the Court granted such motion.

And for the reasons appearing from the record, and for the reasons aforesaid, the defendant now asks that such order be vacated and set aside, and that the case proceed to hearing upon the issue joined.

DOUGLAS W. BAILEY,  
Solicitor for the Defendant.

Filed Aug. 23, 1909. G. H. Marsh, Clerk United States Circuit Court, District of Oregon.



And afterwards, to wit, on Friday, the 15th day of October, 1909, the same being the 11th Judicial day of the regular October, 1909, Term of said court—Present, the Honorable CHARLES E. WOLVERTON, United States District Judge, presiding—the following proceedings were had, in said cause, to wit:

**[Order Denying Motion to Vacate the Decree Pro Confesso.]**

*In the Circuit Court of the United States for the District of Oregon.*

No. 3496.

October 15, 1909.

JOHN B. SWITZLER

vs.

F. E. EARNHART.

Now, at this day, come the plaintiff by Mr. R. J. Slater, of counsel, and the defendant by Mr. D. W. Bailey, of counsel. Whereupon, this cause comes on to be heard upon the motion of said defendant to vacate the decree pro confesso heretofore entered herein, and is argued by counsel. On consideration whereof, it is ordered and adjudged that said motion be, and the same is hereby, denied.



*In the Circuit Court of the United States for the  
District of Oregon.*

JOHN B. SWITZLER,

Complainant,

vs.

F. E. EARNHART,

Defendant.

**Decree.**

This cause coming on at this time to be heard upon the motion of the solicitors for the complainant in open court for a final decree on the bill of complaint filed herein, pro confesso, the defendant appearing by D. W. Bailey, of counsel, and it appearing to the Court from the record herein that, subsequent to the filing of the bill of complaint, the defendant appeared by filing a demurrer to said complaint which demurrer was thereafter by this Court duly considered and overruled, and that thereafter the defendant filed an answer to said complaint, but failed to serve a copy thereof upon the plaintiff or his solicitors, or to leave with the clerk of this court a copy of said answer for the complainant, and thereupon the complainant filed a motion under the rules of this Court to strike the said answer from the files, and upon due consideration the said motion was by this Court allowed, and the said answer was thereupon stricken from the files and upon motion of the complainant, an order for a decree pro confesso was entered, and thereafter a motion was filed by the defendant to vacate said order, and upon due con-

sideration thereof this Court has overruled said motion, and the complainant herein now moves this Court for a final decree in accordance with the prayer of the Bill of Complaint, waiving all claims for damages.

It is therefore hereby ordered, adjudged and decreed that the complainant John B. Switzler is a citizen of the United States, over twenty-one years of age, and is a resident and inhabitant of Umatilla County, State of Oregon, and is not the owner of sufficient land, together with the land hereinafter described, which would amount to more than 320 acres, and was at the time the bill of complaint was filed herein and at all the times mentioned in said bill of complaint, and is now in all respects qualified to enter and purchase from the United States, public lands thereof, under the public land laws of the United States.

That on or about the — day of ———, 1893, the complainant, for the purpose and with the intention of entering, purchasing and obtaining the title thereto from the United States, settled upon, took possession of and placed permanent and valuable improvements upon that certain tract of public land of the United States, situated in Umatilla County, State of Oregon, generally known and described as the Dave Beavert Island, the same being unsurveyed and an island in the Columbia River in what will be when the lines of the public survey are extended thereto, in Section 4, Twp. 5, and Section 33, Twp. 6, N. R. 30, and contains about 80 acres, said island

being surrounded by water of the Columbia River continuously, excepting occasionally at extreme low water, when at one point the channel between said island and the main land on the Oregon side, may at such times of extremely low water, become dry for a short distance, but otherwise and usually the water surrounding said island forms a natural enclosure thereof.

That at the time complainant settled upon and took possession of said island for the purpose of protecting the shores thereof, from washing away and for the purpose of holding said island in his actual possession against all other persons, complainant planted trees around the shore line thereof which trees have grown to be large and form a protection for the shores of said island and an enclosure thereof, That at the time complainant settled upon said island, there was a dwelling-house and other improvements thereon, which together with the right of possession thereof, the complainant purchased from one Dave Beavert, who prior to said time had possession of and had settled upon said island, for which the complainant paid the said Dave Beavert the sum of Seven Hundred (\$700.00) dollars. That since the complainant has had possession of said island, he has greatly improved the same by clearing, plowing, levelling, cultivating and seeding to alfalfa about eighty acres, upon which there is raised annually a large amount of alfalfa hay, to wit: About 100 tons of the value each year of about \$800.00.

That in addition to the said dwelling-house and eighty acres of alfalfa meadow, and the trees planted

around the shores of said island, the complainant has made other improvements thereon consisting of a chicken-house, outbuildings and fencing. Which together with all other improvements are of the value of not less than Two Thousand (\$2,000.00) dollars.

That on or about the — day of ———, 1903, the complainant desiring to be temporarily absent from said land, leased the same to John D. Hatter for the term of five years, the said Hatter contracting and agreeing for a certain and valuable consideration to enter upon and hold possession of said island as the tenant and lessee of complainant and at the expiration of said time, to return the possession thereof back to the complainant. That on the first day of January, A. D. 1909, a further contract of lease was made and entered into by and between the complainant and the said John D. Hatter, by the terms of which the said John D. Hatter agreed to retain the possession of said island as the lessee of complainant for the term of three months, to and including the first day of March, 1909, for which further use and occupation of said island, said John D. Hatter agreed to pay complainant the sum of One Dollar in advance and at the end of the said term the said John D. Hatter agreed to quit and deliver up the possession of said island to complainant, peaceably and quietly.

That at some time prior to the 31st day of March, 1909, the exact date of which is unknown to the complainant, the said John D. Hatter and the defendant combined and conspired together with divers

other persons, whose names are unknown, to surrender up the possession of the said premises to the said John D. Hatter for the purpose of cheating and defrauding the complainant out of said property, to wit: The possession and right of possession in and to the said island, and all of the said improvements thereon, and in pursuance thereof the said John D. Hatter permitted the defendant to enter upon and take possession thereof, to the absolute exclusion of the complainant, and for the purpose of defrauding the complainant out of his said property, the defendant on and prior to the said 1st day of March, 1909, clandestinely with the fraudulent, corrupt and clandestine aid, assistance and countenance of said John D. Hatter, entered upon and took possession of said premises, and excluded the complainant therefrom, and the said defendant ever since the said 31st day of March, 1909, and up to the filing of the complaint herein and until he removed therefrom under the orders of the court made and entered herein, excluded the complainant therefrom. That the defendant is impecunious and has no property or means out of which a judgment for damages might be recovered. That the value of the said premises and the improvements thereon as herein described and the right of the complainant therein and thereto, is not less than \$4,000.

That the complainant ever since he first settled upon and improved the said island has held the same with the intention and purpose of acquiring title thereto, under the homestead laws of the United



States, and it is now the purpose and intention of the complainant to so acquire the title thereto as soon as the same is surveyed by the United States. That the complainant has a large amount of personal property, consisting of plows, harrows, hay-rakes, mowing machines, wagons, harness, one horse, household furniture including two sets of bedroom furniture with marble tops, bedding and spring mattresses, chairs, tables, cooking stoves and furniture, heating stove, and many other articles necessary for farming and housekeeping upon said premises, of the value of not less than \$500.

That the defendant has no improvements of any kind whatever on said land. That the defendant entered upon and got possession of the said island by the aid, assistance and consent of John D. Hatter, who was in possession of the same as the lessee of the complainant, and the said possession was given to the defendant by the said John D. Hatter, corruptly and for the purpose of preventing the complainant from re-entering upon said land, and taking possession thereof after the expiration of the lease, by the complainant to the said John D. Hatter. That the complainant is entitled to the exclusive possession of the said island as against the defendant, and the said defendant is hereby forever enjoined and restrained from in any manner trespassing upon the said island or entering thereon or interfering with the possession of the complainant thereof, excepting by the consent of the complainant, and the complainant shall have and recover from the defendant his costs herein, to be taxed at \$ ———.

Dated at Portland, Oregon, this 15th day of October, 1909.

CHAS. E. WOLVERTON,  
Judge.

Filed Oct. 15, 1909. G. H. Marsh, Clerk of U. S. Circuit Court, District of Oregon. By J. W. Marsh, Deputy.

---

And afterwards, to wit, on the 17th day of November, 1909, there was duly filed in said court, a petition for appeal, in words and figures as follows, to wit:

*In the Circuit Court of the United States for the District of Oregon.*

JOHN B. SWITZLER,

Complainant,

vs.

F. E. EARNHART,

Defendant.

**Petition for Appeal.**

The above-named defendant and appellant, F. E. Earnhart, conceiving himself aggrieved by the final decree and judgment entered in the above-entitled cause on the 15th day of October, 1909, hereby appeals from said Decree and Judgment. Said appellant, F. E. Earnhart, prays that this, his appeal to the United States Circuit Court of Appeals for the Ninth Circuit, may be allowed and that a transcript of the record and proceedings, and papers on which said final decree and judgment was made, duly au-



thenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California.

And now at the time of the filing of this petition for appeal said appellant, F. E. Earnhart, files an assignment of errors, stating separately and particularly each error asserted and intended to be urged in the United States Circuit Court of Appeals for the Ninth Circuit.

And your petitioner will ever pray.

DOUGLAS W. BAILEY,

Solicitor for Defendant and Appellant.

F. E. EARNHART,

Deft. and Appellant.

Filed Nov. 17, 1909. G. H. Marsh, Clerk of the United States Circuit Court, District of Oregon.

---

And afterwards, to wit, on the 17th day of November 1909, there was duly filed in said court, an assignment of errors, in words and figures as follows, to wit:

*In the Circuit Court of the United States for the District of Oregon.*

JOHN B. SWITZLER,

Complainant,

vs.

F. E. EARNHART,

Defendant.

**Assignment of Errors.**

To Whom It May Concern:

The defendant and appellant herein, F. E. Earnhart, having presented his petition for appeal to the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, from the decree entered in the above-entitled cause by the above-entitled court on the 15th day of October, 1909, wherein it was ordered and decreed that the plaintiff have the relief substantially as prayed for in his bill of complaint, and said appeal has been allowed;

The defendant and appellant will, upon said appeal and the hearing thereof, rely upon the following assignments of error:

1.

The Honorable Circuit Court erred in holding and finding as a conclusion of law herein that this Court had jurisdiction of the alleged cause of suit set forth in the plaintiff's bill of complaint.

2.

That the said Honorable Circuit Court erred in not holding and finding as a conclusion of law herein that it appeared from the plaintiff's bill of complaint that no federal question is involved in this suit.

3.

The Honorable Circuit Court erred in not holding and finding as conclusions of law herein that it appears from the plaintiff's bill of complaint that this Court has no jurisdiction of the subject matter of this suit or jurisdiction to try the same.

" 4.

The Honorable Circuit Court erred in not sustaining the demurrer of the defendant to the Bill of Complaint.

5.

The Honorable Circuit Court erred in overruling the defendant's demurrer to the bill of complaint.

6.

The Honorable Circuit Court erred in holding and finding as conclusions of law herein that the plaintiff's motion for a decree pro confesso should be allowed and striking defendant's answer from the files and from the record in this cause.

7.

The Honorable Circuit Court erred in not overruling and denying the plaintiff's motion herein for a decree pro confesso and to strike defendant's answer from the files herein.

8.

The Honorable Circuit Court erred in holding and finding as conclusions of law that the defendant's motion to vacate the order for a decree pro confesso and striking the answer from the files should be denied.

9.

The Honorable Circuit Court erred in overruling and denying defendant's motion to vacate the order for a decree pro confesso and to reinstate the defendant's answer stricken from the files.

10.

The Honorable Circuit Court erred in holding and

finding as conclusions of law that the motion made by the plaintiff in open court for an absolute decree for want of an answer should be allowed.

## 11.

The Honorable Circuit Court erred in allowing and granting the motion of plaintiff made in open court for an absolute decree as for want of an answer.

## 12.

The Honorable Circuit Court erred in entering a decree in favor of the plaintiff and against the defendant upon plaintiff's motion as for want of an answer.

## 13.

The Honorable Circuit Court erred in granting the plaintiff a decree against the defendant without proof of facts alleged in his bill of complaint.

## 14.

The Honorable Circuit Court erred in granting and entering a decree for the plaintiff herein and against the defendant.

## 15.

The Honorable Circuit Court erred in assuming jurisdiction of this cause.

## 16.

The Honorable Circuit Court erred in holding and finding as conclusions of law that it had jurisdiction of this cause for any purpose.

Wherefore, the defendant and appellant prays that said judgment and decree of the Circuit Court may be reversed and the appellant have such other and

further relief herein as may seem just and proper upon the hearing of said appeal and which under the law he may be entitled to have.

DOUGLAS W. BAILEY,

Solicitor for the Defendant and Appellant.

F. E. EARNHART,

Deft. and Appellant.

Filed November 17, 1909. G. H. Marsh, Clerk of the U. S. Circuit Court, District of Oregon.

---

And afterwards, to wit, on Wednesday, the 17th day of November, 1909, the same being the 39th judicial day of the regular October, 1909, term of said court—Present, the Honorable CHARLES E. WOLVERTON, United States District Judge, presiding—the following proceedings were had in said cause, to wit:

*In the Circuit Court of the United States for the District of Oregon.*

JOHN B. SWITZLER,

Complainant,

vs.

F. E. EARNHART,

Defendant.

### **Order Allowing Appeal.**

Now, on this 17th day of November, 1909, the same being the 39th Judicial Day of the October Term of the above-entitled court, in open court, at the courtroom of said court, in the City of Portland, State of Oregon, the defendant and appellant herein, F. E. Earnhart, presents his petition for appeal;

And upon said petition it is ordered that such appeal be and the same is hereby allowed as prayed for.

CHAS. E. WOLVERTON,  
District Judge.

Filed November 17, 1909. G. H. Marsh, Clerk,  
United States Circuit Court, District of Oregon.

---

And afterwards, to wit, on the 17th day of November, 1909, there was duly filed in said court, a bond on appeal, in words and figures as follows, to wit:

*In the Circuit Court of the United States for the  
District of Oregon.*

JOHN B. SWITZLER,

Complainant,

vs.

F. E. EARNHART,

Defendant.

**Bond on Appeal.**

Know All Men By These Presents, that we, F. E. Earnhart, as principal and C. C. Hendricks as surety, are held and firmly bound unto the above-named plaintiff, John B. Switzler, in the full sum of \$500.00 to be paid to the said John B. Switzler, the complainant, his executors, administrators and assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

Sealed with our seals and dated this 16th day of November, 1909.



Whereas, the above-named defendant and appellant, F. E. Earnhart, has prosecuted his appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the decree rendered in the above-entitled suit in the above-entitled court, on October 15, 1909.

Now, therefore, the condition of this bond is, that if the above-named F. E. Earnhart shall prosecute his said appeal to effect and answer all damages and costs that may be obtained or awarded against him if he should fail to make good his appeal, then this obligation to be void, otherwise in full force.

FREDERICK E. EARNHART,

Defendant and Appellant.

C. C. HENDRICKS,

Surety.

State of Oregon,

County of Umatilla,—ss.

I, C. C. Hendricks, being first duly sworn, depose and say: That I am a resident and householder within the State of Oregon and am worth the sum of \$1,000.00 over and above my debts and liabilities and exclusive of property exempt from execution.

C. C. HENDRICKS.

Subscribed and sworn to before me this 16th day of November, 1909.

[Seal]

J. B. PERRY,

Notary Public for Oregon.

Taken and approved by me this 17th day of November, 1909, the same being the 39th Judicial day of the October Term of the above-entitled court,



in open court, at the courtroom of said court in the City of Portland, State of Oregon.

CHAS. E. WOLVERTON,  
District Judge.

Filed November 17, 1909. G. H. Marsh, Clerk of U. S. Circuit Court, District of Ore.

---

**[Certificate of Clerk U. S. Circuit Court to Transcript of Record.]**

United States of America,  
District of Oregon,—ss.

I, G. H. Marsh, Clerk of the Circuit Court of the United States for the District of Oregon, pursuant to the foregoing order allowing appeal and in obedience thereto, do hereby certify that the foregoing pages, numbered from three to 52, inclusive, contain a true and complete transcript of the record and proceedings had in said court, in the case of John B. Switzler, plaintiff and appellee, against F. E. Earnhart, defendant and appellant, as the same appear of record and on file at my office and in my custody.

And I further certify that the cost of the foregoing transcript is Twenty-two 40/100 Dollars, and that the same has been paid by said appellant.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Portland, in said District, this 7th day of December, 1909.

[Seal]

G. H. MARSH,  
Clerk.

[Endorsed]: No. 1801. United States Circuit Court of Appeals for the Ninth Circuit. F. E. Earnhart, Appellant, vs. John B. Switzler, Appellee. Transcript of Record. Upon Appeal from the United States Circuit Court for the District of Oregon.

Filed December 21, 1909.

F. D. MONCKTON,  
Clerk.